

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board

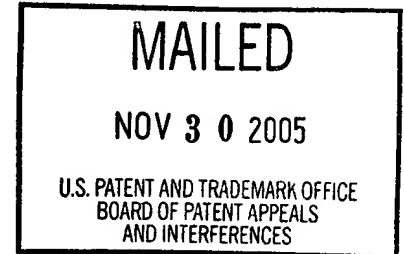
UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARTIN W. MASTERS, MATTHEW PIETRAFITTA and
THERESE VELDE

Appeal No. 2005-2324
Application 09/944,315

ON REQUEST FOR REHEARING



Before WALTZ, KRATZ and PAWLIKOWSKI, *Administrative Patent Judges*.
WALTZ, *Administrative Patent Judge*.

Pursuant to the provisions of 37 CFR § 41.52(a)(1)(2004), appellants have submitted a Request for Rehearing dated October 24, 2005 (hereafter "Request"), of the Decision in Appeal No. 2005-2324 dated August 31, 2005 (hereafter the "Decision"), where the examiner's rejections under 35 U.S.C. §§ 102(e) and 103(a) over Widmer were affirmed (Decision, page 3).

Appellants request rehearing on two grounds, namely that the claim construction in the Decision does not take into account the

viewpoint of the person skilled in the art and the section 103(a) rejection lacks proper support (Request, page 1).

With regard to the first ground, appellants argue that the claims do not read on the cited references when the terms of the claims are properly read in the context of the application (Request, page 1). Specifically, appellants argue that the term "texture" has not been properly construed since the Decision omits any discussion of the requirement to read the terms in the context of the specification from the vantage point of those involved in designing and manufacturing hearing instruments (Request, page 2). Appellants thus argue that, properly construed, the terms of the claims do not include the reinforcing ribs of Widmer as these ribs are "clearly too large and widely spaced" to be considered the "texture" defined in the specification (*id.*). Finally, appellants argue that the reliance on Figure 15 of Widmer in the Decision is "inapposite" since this Figure illustrates the inside of a hearing instrument while appellants are concerned with a problem involving "only the outer surface of the shell" of the hearing instrument (*id.*).

Appellants' arguments are not persuasive of any error in our Decision. As clearly set forth on page 5 of the Decision, the original specification discloses that the term texture "may be a

series of lines 50, equally or unequally spaced (Figures 3 and 4), or a plurality of shapes (e.g., ovals and circles in Figures 5 and 6, respectively), or some other pattern, predetermined or randomly generated" (specification, page 5, 11. 1-6). Since the specification is usually dispositive in claim construction, and is the single best guide to the meaning of a disputed term, we need not consult any extrinsic evidence. See *Phillips v. AWH Corp.*, 415 F.3d 1303, 1315, 75 USPQ2d 1321, 1327 (Fed. Cir. 2005). Therefore, appellants' argument that the ribs of Widmer are "clearly too large and widely spaced" to be considered the "texture" defined in the application (Request, page 2) is not well taken since appellants' own specification defines "texture" without any limits to size and space. Appellants have not explained how one of ordinary skill in this art would have construed the clear definition of "texture" in the specification to exclude the ribs of Widmer.

Appellants' argument concerning the reliance on Figure 15 in the Decision is also not well taken (Request, page 2). Although appellants argue that they are concerned with a problem involving only the outer surface of the shell of a hearing instrument (Request, page 2), claim 1 on appeal is not so limited (Decision, page 6). Furthermore, the Decision also relies on Figure 18 of

Widmer, which shows ribbing on the outer shell of a hearing instrument (Decision, page 7; Widmer, col. 11, ll. 35-43).

With regard to the second ground, appellants disagree with the assertion in the Decision that appellants did not contest the "taking of 'official notice'" (Request, page 2); see the Decision, pages 7-8). However, we find no specific instance in the Brief or Reply Brief where appellants contested or disputed the examiner's taking of "official notice." Appellants have cited the Reply Brief, page 4 (Request, page 2), but the only argument on this page concerns claim construction.

Appellants cite the examiner's statement that "it is known to include a textured faceplate onto [sic] a hearing instrument..." (Request, page 2; Answer, page 4). Appellants assert that this is a "critical issue" and the examiner has failed to provide evidence supporting this statement (Request, page 2). However, we consider this argument waived since this "critical issue" was not previously relied upon or presented in either the Brief or Reply Brief. See *In re Kroekel*, 803 F.2d 705, 709, 231 USPQ 640, 642-43 (Fed. Cir. 1986) (failure of appellant to present an argument before the Board prior to a request for rehearing constitutes a waiver of such argument); see also 37 CFR § 41.52(a)(1)(2004).

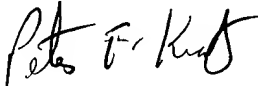
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Accordingly, we have considered each of appellants' grounds for rehearing to the extent discussed above but find no argument convincing us of error in the conclusions we reached in our Decision. Therefore the Request for Rehearing is denied.

DENIED



THOMAS A. WALTZ
Administrative Patent Judge)



PETER F. KRATZ
Administrative Patent Judge)



BEVERLY A. PAWLIKOWSKI
Administrative Patent Judge)

) BOARD OF PATENT
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